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John G. Shram

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CONTRACT LAW—THE COLLISION OF TORT AND CONTRACT LAW: VALIDITY AND ENFORCEABILITY OF EXCULPATORY CLAUSES IN ARKANSAS. *Jordan v. Diamond Equipment*, 2005 WL 984513 (2005).

I. INTRODUCTION

"And the Lord said: Let there be contracts and Let there be torts. And it was so. And He divided contracts from torts."[1] Unfortunately, in some situations the line separating contracts from torts is not as clear and definitive as the Lord may have intended.[2] Instead of a clear line, the border between torts and contracts is an uncertain, and at times, confusing area shaded in gray.[3] In this gray area, the difficult question emerges of whether, or under what conditions, may a contract limit or "exculpate" tort liability.[4]

Tort law provides that a party to whom a duty of care is owed can pursue damages against another for acts that breach that duty, if those acts were reasonably foreseeable to lead to the harm and were the proximate cause of that harm.[5] At common law, a person was prohibited from using a contract to avoid potential liability for the negligent breach of that duty of care.[6] Under modern law, the conflict between tort and contract law arises when parties to a contract agree to limit the duty of care through the use of an exculpatory clause.[7] The issue at the intersection of contract and tort law is whether such a contract remains enforceable under contract law, or whether the contract violates tort law and is therefore void as against public policy.[8]

An exculpatory clause is "[a] contractual provision relieving a party from any liability resulting from a negligent or wrongful act."[9] This note examines the Arkansas Supreme Court's recent decision in *Jordan v. Diamond Equipment & Supply Co.*, [10] and the requirements, parameters, and conditions necessary for Arkansas courts to hold exculpatory clauses valid

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1. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 346 n.315b (1960); *See also* Natasha V. Konon, Note, Sommer v. Federal Signal Corp.: *Clarifying the Confusion Over the Tort/Contract Borderland and the Rules of Contribution*, 14 PACE L. REV. 543, 543 (1994).

2. Konon, *supra* note 1, at 543.

3. *Id.*

4. *See* Keith Bruett, Note, *Can Wisconsin Businesses Safely Rely Upon Exculpatory Contracts to Limit Their Liability?*, 81 MARQ. L. REV. 1081, 1081 (1998).

5. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 461 (1993).

6. J.D. LEE & BARRY LINDAL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 9.07 (2d ed. 1993).

7. *See* Konon, *supra* note 1, at 543.

8. Appellant's Joint Appendix at 123, Jordan v. Diamond Equip. & Supply Co., No. 04-1113, 2005 WL 984513 (Ark. Apr. 28, 2005).

9. BLACK'S LAW DICTIONARY 588 (7th ed. 1999).

10. No. 04-1113, 2005 WL 984513 (Ark. Apr. 28, 2005) ("*Jordan*").

and enforceable in light of that decision. After a review of the pertinent facts of *Jordan*,[11] this note briefly examines the historical development and general use of exculpatory clauses in America from the beginning of the twentieth century to present, and then specifically in Arkansas.[12] This note then examines the analysis and reasoning in the *Jordan* decision.[13] This note concludes with a discussion of the potential effects and implications of the *Jordan* decision on consumers in Arkansas, and an investigation into the possible consequences if the rule of law relating to exculpatory clauses stemming from the *Jordan* decision is extended or applied into other "service" professions.[14]

II. FACTS

A. The Incident

Michael Jordan earned his living as a landscaper.[15] On October 31, 2001, he was engaged in a landscaping project in Benton County, Arkansas.[16] The project required the transportation of loose gravel to the top of a slope at a customer's job site.[17] To accomplish this task, Jordan visited Diamond Equipment and Supply Company ("Diamond") for the purpose of renting an appropriate piece of equipment.[18] Diamond was in the business of renting and leasing tools and equipment to the public.[19] Jordan did not come to Diamond to rent any "specific" piece of equipment; instead, he sought the advice of Diamond personnel as to the appropriate piece of equipment to accomplish the job.[20] Based on Diamond's recommendation, Jordan rented (for one day) a piece of equipment called a Bobcat Model 763 Skid-Steer Loader ("Bobcat").[21] The rental contract that Jordan signed for the Bobcat

11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Part IV.
14. *See infra* Parts V & VI.
15. *Jordan*, 2005 WL 984513, at *1.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Jordan*, 2005 WL 984513, at *1. Plaintiff's counsel described the Bobcat as follows:
> The Bobcat loader is a four-wheel rubber-tired gasoline-powered machine equipped with a bucket in the front actuated by hydraulic cylinders and is designed, when so equipped, for the purpose of loading, transporting, and dumping loose materials. It has a short wheel base and a high center of gravity. It is so designed that when empty 70% of the vehicle weight is carried by the rear wheels and when the bucket is filled to the recommended maximum capacity, 70% of

contained an exculpatory clause.[22] In relevant part, the exculpatory clause read:

> Diamond Equipment Rental and Supply, Inc. is not responsible for injuries or damages sustained in the use of these items whether the damages are due to neglect, mechanical failure, or any other cause whatsoever, regardless of who happens to be operating the equipment. The lessee assumes full liability from the time the equipment is rented until it is returned. The lessee accepts the items in the "as is" condition and does hereby absolve and relieve lessors from any liability by reason of or resulting from the condition of the rented items....Any repairs made to items listed in this contract by anyone other than a lessor or its employee shall be the sole responsibility of the lessee, unless written authority for said repairs is granted by Diamond Equipment Rental and Supply, Inc.[23]

In the course of moving the materials up the slope, the Bobcat became top-heavy and overturned, rolling over several times on its way down the slope.[24] As a result, Jordan suffered permanent spinal injuries.[25]

B. Procedural Posture

Jordan commenced an action in negligence against Diamond.[26] Jordan alleged, inter alia, that the exculpatory clause did not relieve Diamond from liability for: (1) failing to advise him of the operating parameters and limitations of the Bobcat; and (2) failing to provide him with adequate instructions and warnings necessary for the safe operation of the equipment.[27]

> the total vehicle weight is carried by the front wheels. As a consequence of its design, it is highly unstable when operated on inclines. Also as a consequence of its design, it is subject to a sudden change in the location of the center of gravity when the bucket is either filled or dumped.

Joint Appendix at 5–6, *Jordan* (No. 04-1113).

22. *Jordan*, 2005 WL 984513, at *3.
23. *Id.*
24. *Id.* at *1.
25. *Id.*
26. *Id.*
27. *Id.* Specifically, Jordan's theory of negligence consisted of:

> (1) failure to take into account in advising Jordan of the appropriate machine for the conditions and circumstances under which he intended to use it; (2) failure to adequately instruct Jordan as to the safe operating procedures and conditions upon which the machine could be safely operated; (3) failure to advise Jordan of the stability characteristics of the machine and of the difference in distribution of weight bias in loaded versus unloaded conditions; (4) failure to warn Jordan that the Bobcat loader was unsuited for use of loading or unloading materials upon an inclined surface, which could have been reasonably anticipated by Diamond; (5) failure to warn Jordan that the Bobcat loader was suitable for use, including loading and unloading, only on relatively flat surfaces; and (6) failure to instruct

Diamond denied the allegations but asserted the exculpatory language in the agreement as an affirmative defense and moved for summary judgment.[28] The trial court ruled that the exculpatory clause, even though located on the reverse side of the rental contract, was conspicuous, clear, and unambiguous, and that "the exculpatory clause sets out what negligent liability is to be avoided in very clear language."[29] Accordingly, the trial court granted Diamond's motion for summary judgment, and Jordan subsequently appealed to the Arkansas Supreme Court.[30] Jordan's main point on appeal was that the trial court should have found the exculpatory language unenforceable as against public policy.[31] Conversely, Diamond argued that the exculpatory language was enforceable under contract law and conformed to Arkansas public policy.[32]

III. BACKGROUND

Exculpatory clauses, also referred to as "hold harmless" clauses,[33] exempt parties from responsibility for the consequences of their actions.[34] A party seeking to limit its liability by means of a contractual provision is initially given the benefit of the doubt by a legal system that generally respects the rights of parties to agree and contract as they see fit.[35] However, the judiciary's deference to the sanctity of contract has its limits.[36] Although exculpatory clauses are not illegal per se, "contracts that exempt a party from liability" for negligence are not favored by the law.[37] "This disfavor is based upon the strong public policy of encouraging the exercise of care."[38] Traditionally, courts have been concerned that such agreements might: (1)

> and educate its personnel as to the proper operating procedures of skid-steer loaders and of the stability characteristics of these machines.

Id.

28. *Jordan*, 2005 WL 984513, at *2.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Bruett, *supra* note 4, at 1082–83.

34. Dobratz v. Thomson, 468 N.W.2d 654, 657 n.1 (Wis. 1991) (defining exculpatory contracts as seeking "to release one or more of its parties from at least some liability resulting from any negligent act or omission or other wrongful act by that party"); *see also* Bruett, *supra* note 4, at 1082.

35. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.29a (2d ed. 2001).

36. *See id.*

37. Plant v. Wilbur, 345 Ark. 487, 493, 47 S.W.3d 889, 893 (2001); *see also* Farmers Bank v. Perry, 301 Ark. 547, 787 S.W.2d 645 (1990); Middleton & Sons v. Frozen Food Lockers, 251 Ark. 745, 474 S.W.2d 895 (1972); Ark. Power & Light Co. v. Kerr, 204 Ark. 238, 161 S.W.2d 403 (1942); Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S.W. 249 (1909).

38. *Jordan*, 2005 WL 984513, at *2; *see also* 17A AM. JUR. 2D *Contracts* § 281 (2004).

promote behavior by those performing services that is dangerous or injurious to the public; and (2) shift the risk of loss and associated costs to those not able or best suited to bear them.[39] Although invalidating contracts to uphold public policy is generally recognized to be within the province and power of the judiciary, it is also incumbent upon the judiciary to uphold freedom of contract.[40] Generally, assuming a contract is willingly entered into, the contract is enforceable by the courts if it does not otherwise violate public policy.[41] When the judiciary invalidates contracts to uphold public policy, the question arises as to how far, in the absence of clear guidance from constitutional or legislative sources, courts should extend judicial public policy factors in determining the validity of otherwise enforceable contracts.[42] If the judiciary engaged in a detailed, substantive review of the provisions of every litigated contract, the court system would be overwhelmed and individual parties would suffer the loss of freedom and predictability of their contractual and economic outcomes.[43] Thus, courts must be sensitive in balancing their views regarding the interaction between public policy concerns and the fundamental right of contract.[44] Because judges draw not only on constitutional or statutory law, but also on their own developing perceptions as to what constitutes public interest or morality, judges can only administer public policy justice at some cost to contractual freedom and uncertainty of market transactions.[45]

This section briefly addresses the factors used when determining the validity and enforceability of exculpatory clauses.[46] With these factors in mind, it then reviews the history and development of exculpatory clauses in America from the *Lochner* era forward to the modern era (post-1970).[47] This section concludes with a review of the history and development of exculpatory clauses specifically in Arkansas and the changing attitudes related to exculpatory clauses by the modern Arkansas judiciary.[48]

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39. SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 12:2 (4th ed., Richard A. Lord ed., 1998); *see also* Shell, *supra* note 5, at 461.
40. WILLISTON, *supra* note 38, at § 12:3.
41. *Id.*
42. *Id.*
43. Shell, *supra* note 5, at 438–39.
44. WILLISTON, *supra* note 38, at § 12:3.
45. Shell, *supra* note 5, at 440–41.
46. *See infra* Part III.A.
47. *See infra* Parts III.B. & C.
48. *See infra* Parts III.D. & E.

A. Factors in Determining the Validity and Enforcement of Exculpatory Clauses

The Second Restatement of Contracts offers the following guidelines regarding the validity of exculpatory clauses:

> § 195 Term Exempting From Liability for Harm Caused Intentionally, Recklessly, or Negligently
>
> (1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.
>
> (2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if:
>
> (a) the term exempts an employer from liability to an employee for injury in the course of his employment;
>
> (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or
>
> (c) the other party is similarly a member of a class protected against the class to which the first party belongs.
>
> (3) A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.[49]

Paragraphs one and two of section 195 outline liability for which exculpation will not be permitted as a matter of law, while paragraph three discusses conditions in which an exculpatory clause can be held valid and enforceable.[50] Because of the unreasonable risk to the general welfare, both the Restatements of Torts and Contracts invalidate exculpatory clauses that attempt to limit liability for harm caused intentionally or recklessly.[51] Thus, by specific rule, liability for *intentional* torts cannot be contractually negated.[52] Some courts further extend the ban on contractual negation of intentional torts to include negligent acts that are wantonly or recklessly committed.[53] Paragraph two designates several relationships in which liability for

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49. RESTATEMENT (SECOND) OF CONTRACTS: TERM EXEMPTING FROM LIABILITY FOR HARM CAUSED INTENTIONALLY, RECKLESSLY OR NEGLIGENTLY § 195 (1981).

50. *Id.*

51. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS §§ 282, 500, 892, 892D (1965).

52. RESTATEMENT (SECOND) OF CONTRACTS § 195 (emphasis added).

53. *Id.* The rules forbidding contractual exculpation of intentional torts have not changed for generations and thus will not be the focus of this note. *Id.*

ordinary negligence cannot be exculpated as a matter of law.[54] When one party to the contract is a member of a "protected" class, liability exemption for even ordinary negligence will not be permitted.[55] Most notably, these protected classes consist of: employer-employee relationships; landlord-tenant relationships; and persons charged with a duty of public service (e.g. railroads, common carriers, public utilities).[56] In these types of relationships, one party will usually possess superior bargaining power; thus, in order to promote reasonable care, complete exculpation of negligence liability is not permitted as a matter of public policy.[57] Paragraph three of section 195 provides guidelines for relationships (other than those relationships detailed in paragraph two, in which negligence exculpation is forbidden), under which an exculpatory clause can be held valid and enforceable.[58]

Contracts containing exculpatory clauses aimed at negating liability for ordinary negligence (the primary issue in *Jordan*) will be the focus of this note.

B. Development and Treatment of Exculpatory Clauses in America During the *Lochner* Era

As evidenced by the development of the doctrine of economic substantive due process, the *Lochner*[59] era is generally considered the high point for freedom of contract. [60] Nevertheless, "[t]he *Lochner* Court was deeply suspicious of contractual clauses significantly limiting or disclaiming liability for negligence."[61] Around the turn of the twentieth century, in a series of cases involving injury to people or property, the United States Supreme Court established an immutable rule that demanded reasonable care from contracting parties regardless of any contractual limitation of negligence liability.[62] In one of the earliest cases, *The Steamer Syracuse*,[63] a canal boat, which was being towed from Albany to New York City, was damaged (and subsequently sank) by the tug master as he maneuvered through the busy New York harbor.[64] The Court ruled that an exculpatory clause contained in the contract, which stated that the boat was being towed "at the risk of her

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. RESTATEMENT (SECOND) OF CONTRACTS § 195.
59. Lochner v. New York, 198 U.S. 45 (1905) (overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)) ("*Lochner*").
60. Shell, *supra* note 5, at 445.
61. *Id.* at 461.
62. *Id.* at 461–62.
63. 79 U.S. (12 Wall.) 167 (1870).
64. *Id.* at 167.

master and owner," was unenforceable and could not eliminate the tug master's duty of reasonable care.[65] The Court opined that the exculpatory language in the contract was ineffective because the damage to the canal boat was the result of negligence; thus, the tug company was liable for the damage regardless of previous contractual limitations.[66] Even during the *Lochner* era's increased emphasis on freedom of contract, the Court held accountability for negligent actions to an even higher priority than freedom of contract.[67]

In 1889, the Court again affirmed its immutable rule of liability regarding negligent actions regardless of contractual exculpation in *Liverpool and Great Western Steam Company v. Phenix Insurance Company.* [68] In *Liverpool,* a steamship loaded with cargo departed from New York bound for England.[69] The bills of lading executed between the carrier and its cargo customers included a broad exculpatory clause that exempted from liability, among other things, any losses due to negligence.[70] As the vessel approached her destination, foggy weather hampered the navigation efforts of the captain.[71] This resulted in the steamer's running aground and losing a portion of its cargo.[72] Contrary to the holding of the New York trial court, the United States Supreme Court ruled that public policy prohibited common carriers from limiting liability for their own negligence.[73] The Court observed that the unequal bargaining power of the customers as against the carrier resulted in customers simply accepting the bills of lading because they did not have adequate time or resources to seek other carriers or pursue redress in the courts.[74] The Court held that the nature of the bill of lading and its corresponding exculpatory clause forced customers to accept the document in its entirety or else abandon their business.[75] In essence, the Court was concerned with the apparent inability of customers to effectively negotiate with providers of limited or monopolistic services.[76]

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65. *Id.* at 170.
66. *Id.* at 171.
67. *See* Shell, *supra* note 5, at 462.
68. 129 U.S. 397 (1889) ("*Liverpool*").
69. *Id.* at 435.
70. *Id.*
71. *Id.* at 436.
72. *Id.*
73. *Id.* at 441–42. The case was appealed to the United States Supreme Court under a federal Admiralty law claim. *Id.* at 398. The United States Supreme Court's decision was contrary to the laws of New York and England, both of which would have permitted and enforced the exculpatory clause in the contract. *See id.* at 461.
74. Liverpool, 129 U.S. at 441.
75. *Id.*
76. Shell, *supra* note 5, at 463.

The Court was equally disapproving of legislative acts that contained provisions that permitted the enforcement of exculpatory clauses in some contractual situations.[77] Even as legislative actions specifically aimed at lessening restrictions on the enforcement of such exculpatory clauses developed, the Court continued to demonstrate its disfavor by narrowly construing these legislative acts.[78] For instance, "in a striking series of cases following the passage of the Harter Act in 1893,[79] the Court narrowly construed provisions limiting shipowners' liability in order to preserve the rights to due care enjoyed by cargo shippers."[80]

In addition, "the Court construed the Hepburn Act of 1906[81] as preserving its decision in *Railroad Co. v. Lockwood*,[82] despite evidence in the text of the statute that Congress meant to acknowledge the practice of giving drovers 'free' railroad passes by limiting carrier liability."[83]

In summary, even though the judiciary during the *Lochner* era held freedom of contract in high regard, when judges perceived significant un-

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77. *See id.* at 465.

78. *Id.*

79. *Id.* at 466. (46 U.S.C. §§ 190–196 (1988).

> In 1893, Congress passed the Harter Act in response to strong objections from American shipowners to the Court's invalidation of negligence exculpation clauses in maritime shipping contracts. British courts recognized the validity of such exculpation clauses, while the United States Supreme Court did not. This put American ship owners at a competitive disadvantage because American ship owners were forced to load their rates to cover the cost of insurance while British owners could shift this cost to their customers.

Id. at n.205.

80. Shell, *supra* note 5, at 466.

81. *Id.* "(Act of June 29, 1906 (Hepburn Act), ch. 3591, 34 Stat. 584, (codified as amended at 49 U.S.C. § 11104 (1982 & Supp. V 1987))." *Id.* at n.202.

82. 84 U.S. (17 Wall.) 357 (1873). In Railroad Co. v. Lockwood, the Court considered the situation in which a drover, who was shipping cattle on a train and was personally entitled by legislative act to ride for free, was forced to sign an exculpatory clause relieving the railroad from all liability for injury to himself or his cattle. *Id.* at 359. The drover was injured by the negligent acts of the railroad and subsequently brought an action against it. *Id.* The railroad defended itself by alleging the validity of the exculpatory clause. *Id.* The Court held that even though the drover had not paid for the ticket, and was riding on a "drover's pass," a common carrier cannot lawfully exculpate its liability for negligence regardless of whether a passenger had paid full price or was riding for free. *Id.* at 384.

83. Shell, *supra* note 5, at 465; *See* Norfolk S. R.R. v. Chatman, 244 U.S. 276, 280 (1917).

> The Hepburn Act regulated railroads by, inter alia, barring the issuance of 'free passes' to passengers except as necessary to enable drovers and others handlers to take care of their livestock and produce. The railroads argued that this statute constituted legislative recognition that drovers rode free and that negligence exculpations were now enforceable as to these handlers, as they were against other passengers who rode for free. The Court disagreed and construed the Hepburn Act to have preserved the rule against negligence exculpations by railroads.

Shell, *supra* note 5, at 204.

fairness, uneven bargaining power, or the potential for lack of reasonable care, they invalidated exculpatory clauses in order to vindicate perceived public policy principals.[84]

C. Development and Treatment of Exculpatory Clauses During the Modern (Post-1970) Era

Because by the modern era specific legislation had been enacted to address many of the public policy concerns of the *Lochner* era courts, modern courts have tended to shift their focus away from public policy towards the efficiency of the market.[85] Of the competing economic theories influencing the modern judiciary, the most prevalent has been the "efficiency" theory.[86] Law and economics scholars believe that, in order to encourage and promote productive economic growth, predictable laws relating to property and contracts must exist in society.[87] These scholars believe that predictable laws, particularly laws oriented toward businesses, will result in accurately anticipated costs, increased economic incentives, and maximized wealth.[88] Law and economics scholars focus primarily on the unadulterated efficiency of the market and strongly resist restrictive or immutable judicial market interference based on public policy concerns.[89] Partially in response to the developing theory of market efficiency, the modern judiciary has tended to reduce the sources and occurrences of judicial interference or invalidation of contracts and has tended to defer to the individual state's (generally) less restrictive interpretations of public policy.[90] Modern courts also place greater emphasis on determining the exact nature of the parties and the transaction; specifically, whether the contract involves a matter that predominately affects the public versus a private interest.[91] Unlike *Lochner* era predecessors, if a contract involves a purely private transaction, or even a transaction that affects only a small portion of the public, modern courts will usually refuse to invalidate contractual provisions on public policy grounds.[92] If the public interest is not implicated, private parties to a contract are free to allocate risk among themselves in any manner they see fit.[93] The modern judiciary has minimized many of the traditional concerns related to the bargaining process and public policy vigilance and has instead

84. Shell, *supra* note 5, at 467.
85. *Id.* at 492.
86. *Id.* at 502.
87. *Id.* at 497
88. *Id.*
89. *Id.* at 497.
90. Shell, *supra* note 5, at 492.
91. *See* WILLISTON, *supra* note 38, at § 19:22.
92. *See* Shell, *supra* note 5, at 525.
93. WILLISTON, *supra* note 38, at § 19:22.

created doctrines that strongly favor a policy of strict contract construction and inherent market efficiency.[94] Thus, few modern contracts that are not already regulated by legislation or prohibited by criminal law are found to possess the degree of risk of harm to the general public necessary to be invalidated by the courts.[95] Those few contracts that rise to the level necessary to warrant the modern judiciary's public policy evaluation are evaluated under the following guidelines:

> Exculpatory adhesion contracts may be said to violate public policy when it exhibits some, but not necessarily all, of following factors: (1) it concerns business generally thought suitable for public regulation, (2) party seeking exculpation performs service of great importance to public, which is often matter of practical necessity, (3) party holds himself out as willing to perform service for any member of public, or at least for any member within certain established standards, (4) as result of essential nature of service party invoking exculpation possesses decisive advantage of bargaining strength, (5) in exercising superior bargaining power party confronts public with standardized adhesion contract of exculpation, and makes no provision for purchaser to obtain protection against negligence, and (6) as result of transaction, person or property of purchaser is placed at risk of carelessness by seller or his agents . . . .[96]

In general, these factors have led to the development of two special safeguard rules of contract construction that have emerged in nearly all jurisdictions with respect to the validity and enforceability of exculpatory clauses.[97] First, because of their general disfavor of exculpatory clauses, courts will nearly always strictly construe an exculpatory clause against the party relying on it.[98] Second, for the exculpatory clause to be considered valid and enforceable, the release must conspicuously and clearly describe the specific liability to be avoided.[99] When evaluating exculpatory clauses, the courts in many jurisdictions, apply these two "special" rules of contract construction.[100]

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94. Shell, *supra* note 5, at 525.
95. *Id.* at 526.
96. YMCA of Metro. L.A. v. Superior Court, 63 Cal. Rptr. 2d 612, 614–15 (Cal. Ct. App.1997); *see also* WILLISTON, *supra* note 38, at § 19:22.
97. WILLISTON, *supra* note 38, at § 19:21.
98. *Id.*
99. *Id.*
100. *See id.*

D. History and Development of "Traditional" Attitudes Related to the Enforcement of Exculpatory Clauses by the Arkansas Judiciary

In the earliest recorded case dealing with exculpatory clauses in Arkansas, *Gulf Compress Co. v. Harrington,*[101] plaintiff Harrington sought compensation for the loss of thirty-four bales of cotton that were destroyed by fire while in storage at the defendant's facility.[102] Gulf Compress alleged that it was not responsible for the loss because it had contracted against liability, even liability caused by its own negligence.[103] The exculpatory clause stated that Gulf Compress was "[n]ot responsible for loss by fire, acts of Providence, natural shrinkage, old damage, or for failure to note concealed damage."[104] Because the exculpatory clause did not specifically mention liability for negligence, the primary question before the court was whether the exemption included negligence.[105] The release language appeared on a "receipt" prepared by Gulf and issued to Harrington.[106] In *Gulf,* the Arkansas Supreme Court referred to a factually similar Colorado case, *Denver Public Warehouse Co. v. Munger,*[107] in which the Colorado Court of Appeals held that a similar exculpatory clause was unenforceable and observed that: "Contracts against liability for negligence are not favored by the law. In some instances, such as common carriers, they are prohibited as against public policy. In all cases such contracts should be construed strictly, with every intendment against the party seeking their protection."[108]

The *Gulf* court next sought guidance from the California case of *Dieterle v. Bekin.*[109] In *Dieterle,* a warehouse's receipt stated that there would be "[n]o liability for fire."[110] The California court found, however, that such an exculpatory clause could not negate the liability of the warehouse for the exercise of ordinary care.[111] Borrowing from the principals articulated in the Colorado and California cases, the Supreme Court of Arkansas held in *Gulf* that, in accordance with the rules of contract interpretation, an exculpatory clause should be construed strictly against the party relying on it.[112] Further, even if public policy did not forbid enforcement of

101. 90 Ark. 256, 119 S.W. 249 (1909).
102. *Id.* at 257, 119 S.W. at 249.
103. *Id.* at 258, 119 S.W. at 249.
104. *Id.*, 119 S.W. at 250.
105. *Id.*, 119 S.W. at 250.
106. *Id.*, 119 S.W. at 250.
107. 77 P. 5 (Colo. Ct. App. 1904).
108. *Id.* at 5.
109. 77 P. 664 (Cal. 1904).
110. *Id.* at 665.
111. *Id.* at 666.
112. *Gulf,* 90 Ark. at 259, 119 S.W. at 250.

the contract, if the terms of the exculpatory clause were not clearly expressed, the exculpatory clause would be held unenforceable.[113] Thus, because of the exculpatory clause's lack of specificity, the court in *Gulf* strictly construed the ambiguity against Gulf and held the clause unenforceable.[114]

In 1942, in a similar bailment-warehouse case, *Arkansas Power and Light Co. v. Kerr*,[115] the Arkansas Supreme Court reaffirmed its previous ruling that liability related to ordinary care and negligence cannot be contractually negated.[116] When Kerr delivered and stored cases of eggs in Arkansas Power and Light Company's (AP&L) ice cooler, AP&L provided a receipt to Kerr containing an exculpatory clause that attempted in part to relieve Kerr from liability for the condition of the eggs while they were in storage.[117] The court ruled that public policy required a party to exhibit "caution and forethought" when handling the property of others and that the exculpatory clause was not enforceable because the defendant "sought to relieve itself from the consequences of its negligence."[118]

Thirty years later in 1972, in yet another storage-bailment case, *Middleton v. Cato*,[119] the court reiterated its two previously established primary rules regarding liability negation: (1) contracts of this nature are not favored and thus will be strictly construed against the party relying on them; and (2) contracts of this nature will be enforced only if the limiting language clearly and unambiguously sets out what liability is to be avoided.[120] In *Middleton*, the bailee sued to recover the value of over 18,000 pounds of spoiled meat that it had stored in the bailor's frozen food locker.[121] The bailor argued that Middleton verbally agreed to assume all risk of damage to the meat and that Middleton overloaded the refrigeration capacity of the locker by the manner in which it stacked the bailor's meat in the locker.[122] The court noted that, in this case, the contract between the parties was oral and did not clearly specify what risks were being assumed or negated.[123] The court emphasized, however, that neither in *Kerr,* nor in *Middleton*, had it held that it is "impos-

113. *Id.*, 119 S.W. at 250.
114. *Id.*, 119 S.W. at 250.
115. 204 Ark. 238, 161 S.W.2d 403 (1942).
116. *Id.* at 241, 161 S.W.2d at 404.
117. *Id.* at 239–40, 161 S.W.2d at 403–04.
118. *Id.* at 241, 161 S.W.2d at 404.
119. 251 Ark. 745, 474 S.W.2d 895 (1972).
120. *Id.* at 749, 474 S.W. 2d at 897.
121. *Id.* at 746, 474 S.W.2d at 896.
122. *Id.* at 747, 474 S.W.2d at 896.
123. *Id.* at 750–51, 474 S.W.2d at 898. The exculpatory clause was not clear because there were "many risks" associated with the storage of meat in the Defendant's freezer, and the verbal contract did not explicitly specify which risks Defendant was attempting to negate. *Id.* at 751, 474 S.W.2d at 898.

sible to avoid liability for negligence through contract."[124] Rather, the court clarified that to negate liability, the contract must clearly describe what liability is to be avoided.[125] Although the *Middleton* court did not uphold the exculpatory clause before it, *Middleton* was significant because it was the first case in which the Arkansas Supreme Court expressly confirmed that, when clearly and explicitly documented, an exculpatory clause could successfully negate liability for negligence.[126]

Arkansas law regarding exculpatory clauses was next tested in 1987 in the federal district court case (decided under Arkansas law) of *Williams v. United States*.[127] In *Williams*, a teenage boy drowned while attending an ROTC outing at an Air Force base pool.[128] The boy's father had signed a "Student Data and Release form," which the Air Force contended released it from all liability.[129] The *Williams* court noted that it had found no cases in Arkansas "in which agreements purporting to release a party from liability for his own negligence before it occurs have been upheld."[130] Similar to the nearly eighty years of previous Arkansas case law, the *Williams* court was concerned that the contractual release of liability in advance of negligence or damage would discourage the exercise of reasonable care.[131]

In *Williams*, the court applied the special rules of construction requiring an exculpatory clause to specify clearly the liability being negated and to be strictly construed against the party relying on it.[132] The court opined that the Air Force's release form merely advised the parents of a child as to the potential hazards of swimming and diving, not to the potential hazards of Air Force negligence.[133] The court observed that a parent's acceptance of the inherent risk associated with the activity of swimming is quite different from a parent's acceptance of the risk of harm from the Air Force's negligence.[134] Because of the ambiguity of the wording on the release form, the

124. *Id.* at 750, 474 S.W.2d at 898.

125. *Middleton*, 251 Ark. at 750, 474 S.W.2d at 898.

126. *See id.* at 750, 474 S.W.2d at 898.

127. 660 F. Supp. 699 (E.D. Ark. 1987).

128. *Id.* at 701–02.

129. *Id.* at 702. The "Student Data and Release Form" reads in pertinent part as follows:

In the unlikely event that Don is injured while participating in one of these activities, I give my consent for treatment at the U.S. Air Force Hospital at Little Rock Air Force Base and release all agencies and departments of the United States government (Department of Defense and U.S. Air Force), Little Rock Air Force Base, and all members of the United States Air Force and its civilian employees of any and all responsibility and/or liability for injury or death that might occur.

Id. at 702.

130. *Id.* at 702.

131. *Id.* at 702–03.

132. *Id.* at 703.

133. *Williams*, 660 F. Supp. at 703.

134. *Id.*

court once again ruled that public policy rendered the exculpatory clause unenforceable.[135]

In 1998, in a case involving partial liability limitation, *Edgin v. Entergy Operations Inc.*,[136] a security guard who sustained injuries while on duty sought damages contrary to the provisions of the exculpatory clause contained in the employment agreement she had signed.[137] The court noted that historically, in employer-employee relationships, exculpatory clauses exempting an employer for liability from negligence were forbidden.[138] In this case, however, the exculpatory language contained in the employment agreement excluded claims that were covered under workers' compensation insurance.[139] The court distinguished *Edgin* from traditional exculpatory clause cases in that the exculpatory clause in *Edgin* did not negate all negligence claims, but rather, only those claims that were covered under workers' compensation insurance.[140] Because the exculpatory clause limited only otherwise insured claims (worker's compensation), Entergy was still obliged to observe reasonable care.[141] Accordingly, the court determined that the exculpatory clause contained in the employment agreement in *Edgin* was not contrary to Arkansas public policy and upheld the partial exculpation clause.[142]

E. Development of "Changing" Attitudes Related to the Enforcement of Exculpatory Clauses by the Arkansas Judiciary

Arkansas courts have migrated from a traditional policy of tending to hold exculpatory clauses unenforceable as a matter of public policy to a modern policy of enforcing exculpatory clauses under some circumstances.[143]

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135. *Id.*

136. 331 Ark. 162, 961 S.W.2d 724 (1998).

137. *Id.* at 165, 961 S.W.2d at 725.

138. *Id.* at 167, 961 S.W.2d at 726; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 195(2)(a) (1981).

139. *Edgin*, 331 Ark. at 165, 961 S.W.2d at 725. The exculpatory clause is reproduced below:

> I HEREBY WAIVE AND FOREVER RELEASE ANY RIGHTS I MIGHT HAVE to make claims or bring suit against any client or customer of Wackenhut for damages based upon injuries which are covered under such Workers' Compensation statutes.

Id. at 166, 961 S.W.2d at 725.

140. *Id.* at 167, 961 S.W.2d at 726.

141. *Id.* at 168, 961 S.W.2d at 727.

142. *Id.* at 167, 961 S.W.2d at 726.

143. *See* Haines v. St. Charles Speedway, Inc., 874 F.2d 572 (8th Cir. 1989); Williams v. United States, 660 F. Supp. 699 (E.D. Ark. 1987); Jordan v. Diamond Equip. & Supply Co., No. 04-1113, 2005 WL 984513 (Ark. Apr. 28, 2005); Finagin v. Ark. Dev. Fin. Auth., 355

In July of 2001, the Arkansas Supreme Court enforced for the first time a contract containing an exculpatory clause that completely avoided liability for ordinary negligence.[144] In *Plant v. Wilbur*, the plaintiff was experienced in auto racing and was a member of the "pit" crew of one of the drivers at the racetrack.[145] In order to gain admission into the "pits" and "infield" area, the plaintiff freely signed an exculpatory agreement that clearly and comprehensively specified the liability that was to be negated.[146]

Ark. 440, 139 S.W.3d 797 (2003); Plant v. Wilbur, 345 Ark. 487, 47 S.W.3d 889 (2001); Edgin v. Entergy Operations, Inc., 331 Ark. 162, 961 S.W.2d 724 (1998); Farmers Bank v. Perry, 301 Ark. 547, 787 S.W.2d 645 (1990); Middleton v. Cato, 251 Ark. 745, 474 S.W.2d 895 (1972); Ark. Power & Light Co. v. Kerr, 204 Ark. 238, 161 S.W.2d 403 (1942); Gulf Compress Co. v. Harrington, 90 Ark. 256, 119 S.W. 249 (1909); Miller v. ProTransport., 78 Ark. App. 52, 77 S.W.3d 551 (2002).

144. *Plant*, 345 Ark. 487, 495, 47 S.W.3d 889, 894 (2001).

145. *Id.* at 495, 47 S.W.3d at 894.

146. *Id.* at 489, 47 S.W.3d at 890. The exculpatory clause is reproduced below:

> IN CONSIDERATION of being permitted to enter for any purpose any RESTRICTED AREA (herein defined as including but not limited to the racing surface, pit areas, infield, burn out area, approach area, shut down area, and all walkways, concessions and other areas appurtenant to any area where any activity related to the event shall take place), or being permitted to compete, officiate, observe, work for, or for any purpose participate in any way in the event, EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin, acknowledges, agrees and represents that he has, or will immediately upon entering any of such restricted areas, and will continuously thereafter, inspect such restricted areas and all portions thereof which he enters and with which he comes in contact, and he does further warrant that his entry upon such restricted area or areas and his participation, if any, in the event constitutes an acknowledgment that he has inspected such restricted area and that he finds and accepts the same as being safe and reasonably suited for the purposes of his use, and he further agrees and warrants that if, at any time, he is in or about restricted areas and he feels anything to be unsafe, he will immediately advise the officials of such and will leave the restricted areas:
>
> 1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the promoter, participants, racing association, sanctioning organization or any subdivision thereof, track operator, track owner, officials, car owners, drivers, pit crews, any persons in any restricted area, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the event and each of them, their officers and employees, all for the purposes herein referred to as "releasees", from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise while the undersigned is in or upon the restricted area, and/or, competing, officiating in, observing, working for, or for any purpose participating in the event.
>
> 2. HEREBY AGREES TO INDEMNIFY AND SAVE AND HOLD HARMLESS the releasees and each of them from any loss, liability, damage, or cost they may incur due to the presence of the undersigned in or upon the re-

While in this otherwise restricted area, Plant was struck by a tire that became detached from one of the racecars and suffered injuries.[147] The court held that the exculpatory clause was conspicuous and comprehensive, and specifically described the potential liability that was to be negated.[148] The court found that Plant had previously signed many other similar releases, was a regular participant in the sport, and was familiar with the harm and accidents that could occur in an inherently dangerous sport like auto racing.[149] The court found no evidence that Plant was coerced into signing the release.[150] Furthermore, negligence of the "releasees" was specifically mentioned in the release, as well as a provision in which the plaintiff agreed to immediately advise track officials of any perceived unsafe conditions and then proceed to exit the restricted area.[151]

The *Plant* court turned to the Court of Appeals for the Eighth Circuit's case of *Haines v. St. Charles Speedway Inc.*,[152] a remarkably factually similar case, for guidance.[153] In addition to the two special rules applicable to exculpatory clauses (strict construction and clearly described liability to be avoided), the Arkansas Supreme Court adopted the "total transaction" approach utilized by the *Haines* court.[154] Under the total transaction approach,

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stricted area or in any way competing, officiating, observing, or working for, or for any purpose participating in the event and whether caused by the negligence of the releasees or otherwise.

3. HEREBY ASSUMES FULL RESPONSIBILITY FOR AND RISK OF BODILY INJURY, DEATH OR PROPERTY DAMAGE due to the negligence of releasees or otherwise while in or upon the restricted area and/or while competing, officiating, observing, or working for or for any purpose participating in the event.

4. EACH OF THE UNDERSIGNED expressly acknowledges and agrees that the activities of the event are very dangerous and involve the risk of serious injury and/or death and/or property damage. EACH OF THE UNDERSIGNED further expressly agrees that the foregoing release, waiver, and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the Province or State in which the event is conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

5. THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT, and further agrees that no oral representations, statements or inducements apart from the foregoing written agreement have been made.

Id. at 490–91, 47 S.W.3d at 890–91.

147. *Id.* at 491, 47 S.W.3d at 891.

148. *Id.* at 495, 47 S.W.3d at 894.

149. *Id.* at 494–95, 47 S.W. 2d at 894.

150. *Plant*, 345 Ark. at 494–95, 47 S.W. 2d at 894.

151. *Id.* at 490, 495, 47 S.W.3d at 890–91, 894.

152. 874 F.2d 572 (8th Cir. 1989).

153. *Plant*, 345 Ark. at 493, 47 S.W.3d at 893.

154. *Id.* at 493–94, 47 S.W.3d at 893.

the court comprehensively analyzed all the conditions and factors involved in the transaction, not just the literal language of the agreement.[155] In holding the agreement enforceable, the *Plant* court focused on the plaintiff's extensive familiarity and experience with the sport of auto racing as both a spectator and a participant.[156] The court also distinguished *Plant* from previous exculpatory clause cases because it considered auto racing to be a recreational activity affecting only a narrow segment of society, not a matter involving general public interest.[157] The *Plant* majority reasoned that voluntary participation in narrow recreational activities like auto racing does not involve the general public, and therefore, such activities do not warrant public policy concerns.[158]

There was, however, a two-judge dissent in *Plant*.[159] The dissent expressed concern over two factors: (1) whether the release was sufficiently clear and specific to make the plaintiff aware of the liability that he was releasing, and (2) whether differentiating sporting events such as an auto race, hockey game, or wrestling match from other general public activities promotes reasonable standards of care and prudent public policy.[160] A significant point of disagreement in *Plant* was whether an auto racing event should be classified as a narrow, private activity or as an activity affecting the general public.[161] Writing for the dissent, Justice Glaze stated: "We should not, in my opinion, allow parties who promote dangerous sports activities to be effectively immunized from liability when a spectator is injured ... because the party promoting the dangerous sport failed to afford the spectator, as an invitee, a reasonably safe environment."[162]

Thus, *Plant* initiated a debate, which would be revisited in later Arkansas exculpatory clause cases as to what constitutes a *private* versus *public* activity.[163]

In 2002, the Arkansas Court of Appeals decided *Miller v. Pro-Transportation*,[164] another case differentiated by the Arkansas courts by a similar private versus public activity analysis.[165] In *Miller*, a truck driver sought permission from the company to have his wife ride with him in the company vehicle during his delivery hauls.[166] Pro-Transportation permitted

155. *Id.* at 494, 47 S.W.3d at 893.
156. *Id.* at 494–95, 47 S.W.3d at 894.
157. *Id.* at 494, 47 S.W.3d at 893.
158. *Id.*, 47 S.W.3d at 893.
159. *Plant,* 345 Ark. at 496–500, 47 S.W.3d at 895–97 (Glaze, J., dissenting).
160. *Id.* at 499, 47 S.W.3d at 897 (Glaze, J., dissenting).
161. *See id.*, 47 S.W.3d at 897 (Glaze, J., dissenting).
162. *Id.* at 499, 47 S.W.3d at 897 (Glaze, J., dissenting).
163. *See generally id.* at 499, 47 S.W.3d at 897 (Glaze, J., dissenting)(emphasis added).
164. 78 Ark. App. 52, 77 S.W.3d 551 (2002).
165. *Id.*
166. *Id.* at 53, 77 S.W.3d at 552.

Mrs. Miller to ride in the company vehicles in exchange for her signing an exculpatory agreement that provided that she would hold Pro-Transportation harmless from any liability for any injury received while riding in the vehicle.[167] After the Millers were involved in an accident, Mrs. Miller sued Pro-Transportation alleging that her husband's negligence caused the accident, and that the exculpatory agreement was invalid because it did not clearly set out what liability was to be avoided.[168] The court of appeals disagreed and found the agreement to be enforceable because the language "clearly and specifically sets out the negligent liability to be avoided, i.e., liability for any injuries that the applicant may suffer while riding as a passenger in appellee's motor vehicle."[169]

Furthermore, the court applied the total transaction approach as established in the earlier case of *Plant*.[170] Under this approach, the fact that Mrs. Miller had signed agreements permitting her to ride in the vehicle with her husband with at least three previous employers convinced the court that she was very familiar with the risks and dangers associated with commercial trucking.[171] The clarity and specificity of the agreement, as well as the circumstances that indicated that Mrs. Miller was knowledgeable of the risks and dangers associated with commercial trucking, and the fact that Mr. Miller had every reason to drive carefully (because his wife was in the vehicle), convinced the court that no potential public policy or safety concerns existed.[172] In essence, the court held that not only did the exculpatory clause clearly specify what liability was to be avoided, but also that the Millers' situation was a narrow, private matter, and not a matter of public policy or safety.[173]

In 2003, the Arkansas Supreme Court again evaluated the validity and enforceability of exculpatory clauses in *Finagin v. Arkansas Development Finance Authority* (ADFA).[174] In *Finagin*, in order to obtain financing, a group of investors executed personal guarantees that included an exculpa-

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167. *Id.* at 53–54, 77 S.W.3d at 552. The exculpatory clause is reproduced below:

> In consideration of my being permitted to ride as a passenger in a motor vehicle leased or owned by ProTransportation, Inc., I will hold ProTransportation harmless from any liability for any damage or injury which I may receive [sic] while riding in said motor vehicle both as to any right of action that may accrue to myself and to my heirs and personal representatives.

Id. at 55, 77 S.W.3d at 553.

168. *Id.* at 54–55, 77 S.W.3d at 553.

169. *Id.* at 55, 77 S.W.3d at 553–54.

170. *Miller*, 78 Ark. App. at 55, 77 S.W.3d at 554; *see also Plant*, 345 Ark. at 494, 47 S.W.3d at 893.

171. *Miller*, 78 Ark. App. at 55–56, 77 S.W.3d at 554.

172. *Id.*, 77 S.W.3d at 554.

173. *Id.* at 56, 77 S.W.3d at 554.

174. 355 Ark. 440, 139 S.W.3d 797 (2003).

tory clause.[175] After the project defaulted on its note, the investors brought an action against ADFA alleging, inter alia, that ADFA had not adequately protected the collateral.[176] ADFA relied on the validity and enforceability of the exculpatory clause, while the investors argued that the exculpatory clause was too broad and against public policy.[177] The exculpatory clause provided that no set off, counterclaim, or defense of any kind would be available to the guarantors-investors against ADFA.[178] After reviewing and endorsing the history and development of exculpatory clauses in Arkansas, the *Finagin* court developed a refinement to the then existing rules of law applicable to exculpatory clauses.[179] Drawing primarily from the holdings in *Plant* and its predecessors and from public policy factors, the court essentially integrated the two traditional "special rules" of contract construction with the factual "total transaction" approach and established the *Finigan* "factors" for evaluating the validity and enforceability of exculpatory clauses.[180] The court noted that the previous Arkansas cases established the principle that "an exculpatory clause may be enforced: (1) when the party is knowledgeable of the potential liability that is released; (2) when the party is benefiting from the activity which may lead to the potential liability that is released; and (3) when the contract that contains the clause was fairly entered into."[181] The *Finagin* court emphasized the importance of evaluating the total factual circumstances concurrently with the agreement when determining whether each of the "factors" had been met.[182] In upholding the enforceability of the exculpatory clause in *Finigan*, the court noted that the parties to the transaction were sophisticated businesspersons, that the transaction was conducted at arm's length, and that the investors were knowledgeable of the fact that they were waiving potential defenses.[183]

It should be noted that before *Jordan*, the cases in which Arkansas courts have held exculpatory clauses enforceable can be differentiated by either: (1) the association of those clauses with some form of private or narrow activity that did not affect the general public or overall public policy, or

175. *Id.* at 445, 455, 139 S.W.3d at 799–800, 806.

176. *Id.* at 453–54, 139 S.W.3d at 805.

177. *Id.* at 455, 139 S.W.3d at 806. In relevant part, the exculpatory clause reads as follows: "No setoff, counterclaim, reduction, diminution of an obligation, or any defense of any kind or nature which the guarantor [appellants] has or may have against the authority [ADFA] or the trustee shall be available hereunder to the guarantor against the authority." *Id.*, 139 S.W.3d at 806.

178. *Id.*, 139 S.W.3d at 806.

179. *Id.* at 455–58, 139 S.W.3d at 806–08.

180. *See Finagin*, 355 Ark. at 455–58, 139 S.W.3d at 806–08.

181. *Id.* at 458, 139 S.W.3d at 808.

182. *See Id.*

183. *Id.*, 139 S.W.3d at 808.

(2) the fact that the exculpatory clause only partially exempted liability.[184] Specifically, in *Plant*, the court held that recreational auto racing involved only a narrow segment of the public;[185] in *Finagin*, the court held that the exculpatory clause limited only liability from "setoff, counterclaim, reduction, diminution of an obligation . . . ," not a release from all liability;[186] and in *Miller*, that court opined that because Mr. Miller had every reason to drive safely (Mrs. Miller was riding in the vehicle), the circumstances were narrow and did not constitute a safety or public policy concern.[187] Another common fact in these cases is that the parties, against whom the exculpatory clauses were enforced, were voluntarily assuming a well-known risk.[188] With this history in mind, the stage is set for an analysis of a case that does not present a special or narrow circumstance, or a limited exculpation of liability, but instead involves a routine transaction between a business and a member of the general public.[189] It is within this setting that we examine the case of *Jordan v. Diamond Equipment and Supply Corp.*[190]

IV. REASONING

In *Jordan,* the Arkansas Supreme Court, in a four-to-three decision, affirmed the trial court's summary judgment that Diamond Equipment's lease agreement contained an exculpatory clause that was valid and enforceable.[191] After reviewing and endorsing the development of the rules of law used to evaluate the validity and enforceability of exculpatory clauses in Arkansas, the majority held that the exculpatory language effectively released Diamond from liability from any injuries due to "neglect, mechanical failure, or any cause whatsoever."[192] Conversely, in a spirited dissent, the minority argued that the majority "radically deviate[d]" from the cautious approach traditionally used by the court to prevent the erosion of reasonable care.[193]

184. Brief for Petitioner at 127–30, Jordan v. Diamond Equip. & Supply Co., No. 04-1113, 2005 WL 984513 (Ark. Apr. 28, 2005).

185. *Jordan*, 2005 WL 984513, at *3; *see also Plant,* 345 Ark. at 494, 47 S.W. 3d at 893.

186. *Jordan*, 2005 WL 984513, at *7 (Imber, J., dissenting); *see also Finagin,* 355 Ark. at 455, 139 S.W.3d at 806.

187. *Jordan,* 2005 WL 984513 at *7 (Imber, J., dissenting); *see also Miller,* 78 Ark. App. at 56, 77 S.W.3d at 554.

188. Joint Appendix at 127–30, *Jordan* (No. 04-1113).

189. *Id.*

190. No. 04-1113, 2005 WL 984513 (Ark. Apr. 28, 2005).

191. *Jordan*, 2005 WL 984513, at *6.

192. *Id.*

193. *Id.* at *8 (Imber, J., dissenting).

A. The Court Reviews the Enforcement of Exculpatory Clauses in Arkansas

The court began by reviewing the history and development of the enforcement of exculpatory clauses in Arkansas.[194] The court reiterated the long-recognized Arkansas maxim that exculpatory clauses that exempt a party from liability for negligence are not favored by the law because of the strong public policy of encouraging the exercise of reasonable care.[195] The court noted that Arkansas law requires the application of two special rules of contract construction when evaluating the validity and enforceability of an exculpatory clause.[196] First, exculpatory clauses are strictly construed against the party relying on them, and second, the clauses must clearly set out what liability is to be avoided.[197] In addition to the two special rules of contract construction, the court also reviewed the supplemental "factors" to be considered when evaluating an exculpatory clause that were set forth in *Finagin*:[198] (1) a party must be knowledgeable of the potential liability they are releasing; (2) the party must benefit from the activity surrounding the transaction; and, (3) the contract must be fairly entered into.[199] The court further noted that, when evaluating contracts that contain exculpatory clauses, it would consider all the facts and circumstances surrounding the agreement, not just the literal language of the contract.[200]

194. *See Jordan*, 2005 WL 984513, at *2–3.
195. *Id.* at *3.
196. *Id.*
197. *Id.*
198. *Id.* at *2–3.
199. *Id.* at *3.
200. *Jordan*, 2005 WL 984513, at *2.

B. The Majority Finds the Exculpatory Clause Valid

Turning to the specific agreement between Jordan and Diamond,[201] the majority, primarily relying on the precedents set forth in *Edgin*[202] and *Plant*,[203] determined that the release language was clear and unambiguous.[204] The majority found that the language of the exculpatory clause which stated that Diamond is not liable for damages sustained from "neglect, mechanical failure, or any cause whatsoever" was sufficient to satisfy the special rule of contract construction requiring specificity of the liability to be avoided.[205] Furthermore, the majority opined that all three *Finigan* factors were satisfied in *Jordan*.[206] First, because the front of the document contained a provision that said, "Customer has received complete safety instructions," as well as another provision which stated, "See Damage Waiver on Reverse Side. I hereby accept the damage waiver," the majority concluded that Jordan must have been knowledgeable of the potential liability that he was releasing because he signed and initialed the contract.[207] Second, because Jordan utilized the equipment to perform a landscaping job related to his business, the court found that the requirement that a party must benefit from the transaction was fulfilled.[208] Third, because the court found no evidence of "fraud, duress, undue influence, lack of capacity, mutual mistake, or inequitable conduct sufficient to void the contract," it held that the last of the *Finigan* factors, which requires a party to have freely

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201. Reproduced below in relevant part is the section found on the reverse side of the rental agreement entitled "Warranties and Liability" that contained the exculpatory clause:
Diamond Equipment Rental and Supply, Inc. is not responsible for injuries or damages sustained in the use of these items whether the damages are due to neglect, mechanical failure, or any other cause whatsoever, regardless of who happens to be operating the equipment. The lessee assumes full liability from the time the equipment is rented until it is returned. The lessee accepts the items in the "as is" condition and does hereby absolve and relieve lessors from any liability by reason of or resulting from the condition of the rented items. Lessee binds and obligates himself to hold lessors free and harmless from any and all liability from any claims of third persons in connection with or arising out of the condition or use of the rented items. Any repairs made to items listed in this contract by anyone other than a lessor or its employee shall be the sole responsibility of the lessee, unless written authority for said repairs is granted by Diamond Equipment Rental and Supply, Inc.
Id. at *3–4.

202. 331 Ark. 162, 961 S.W.2d 724 (1998).

203. 345 Ark. 487, 47 S.W.3d 889 (2001).

204. *Jordan*, 2005 WL 984513, at *4.

205. *Id.* The first special rule of contract construction requiring that the party relying on the exculpatory clause must clearly specify what liability is to be avoided. *Id.*

206. *Id.*

207. *Id.* The majority twice referred to the rule that a person is presumed to know the contents of the documents they sign. *Id.*

208. *Id.*

entered into the contract, was also satisfied.[209] Furthermore, Jordan's apparent failure to attempt to modify the agreement affirmed the majority's conclusion that the contract was freely entered into and was not a contract of adhesion.[210] In sum, the majority concluded that the language of the exculpatory clause contained in the contract was written in clear and concise terms, was not "inordinately long" or complex, and was executed only after the parties exchanged mutual discussion and training.[211] The majority opined that, when strictly construed against Diamond, the exculpatory clause clearly set out what negligence was to be avoided and was not against public policy; therefore, it also complied with the second special rule of contract construction.[212] For these reasons, the *Jordan* court held that the exculpatory clause contained within the contract was valid and enforceable.[213]

C. The Dissenting Opinion

Writing for the dissent, Justice Imber stated that the majority opinion did not correctly apply Arkansas precedent, "and is founded on a misinterpretation of the challenged exculpatory clause and a misapplication of the law."[214] Specifically, Justice Imber distinguished *Plant*, which was cited by the majority as one of the precedents for its decision, from the case at bar.[215] Justice Imber noted that the court in *Plant* placed significant emphasis on the fact that Plant was very experienced in the sport of autoracing, as compared to Jordan, who apparently had not operated a Bobcat before the day of the accident.[216] Furthermore, the dissent focused on the fact that a fairly limited segment of the public is involved with auto racing, while the segment of the public that could be exposed to exculpatory clauses while renting equipment is limitless.[217] The dissent emphasized that when exculpatory clauses evolve from narrow applications into the daily activities of the general population, the enforcement of these exculpatory clauses "would have sweeping consequences for every future rental agreement in all areas of daily life."[218] According to Justice Imber, *Plant* is also easily distinguishable from *Jordan* because auto racing is purely recreational, while renting

209. *Id.*
210. *See Jordan*, 2005 WL 984513, at *4.
211. *Id.*
212. *Id.* The second special rule of contract construction requires strict construction against the party relying on the exculpatory clause. *Id.*
213. *Id.*
214. *Id.* at *7 (Imber, J., dissenting).
215. *Id.* at *7–8 (Imber, J., dissenting).
216. *See Jordan*, 2005 WL 984513, at *8 (Imber, J., dissenting).
217. *Id.* at *8 (Imber, J., dissenting).
218. *Id.* (Imber, J., dissenting).

equipment in the pursuit of earning a living is not.[219] While a large percentage of the public may participate in recreational activities, nearly everyone participates in earning a living in some fashion.[220]

With regard to public policy, the dissent contrasted the motivations of the defendants in *Edgin*[221] and *Miller*[222] with the motivation of the defendant in *Jordan*.[223] Because their liability was only partially limited by the exculpatory clauses in *Edgin* and *Miller*, the defendants still had considerable motivation to exercise reasonable care.[224] Conversely, according to the minority's interpretation in *Jordan*, the defendant had seemingly little motivation to "maintain its machinery and business in a way that reduces the risk of harm to others."[225] Justice Imber suggested that this situation encouraged lack of care because Diamond could now operate without fear of financial or legal repercussions from its negligence.[226] Thus, the dissent opined that the majority's treatment of the exculpatory clause in *Jordan* deviated from the caution and disfavor with which Arkansas law had traditionally treated exculpatory clauses.[227]

The dissent argued that the majority echoed the traditional notions of strict construction and disfavor, but never actually performed any analysis that explained the precise scope of the exculpatory clause.[228] Unlike the majority, the dissent believed the exculpatory clause was ambiguous.[229] According to Justice Imber, the majority opinion never actually answered the specific question of "who is released and from what liability," and instead it only "quote[d] the vague and inconclusive language of the clause, as if its meaning will become clear with repetition."[230] The dissent also stated that, because the majority's opinion provided no specific explanation of the scope or meaning of the exculpatory clause, the clause could not meet the special rule of contract construction requiring that an exculpatory clause clearly and specifically set out the liability that is to be avoided.[231]

Further, the dissent suggested that the first *Finigan* factor that requires a party to be knowledgeable of the potential liability that he is releasing,

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219. *Id.* (Imber, J., dissenting).
220. *Id.* at *8 (Imber, J., dissenting).
221. 331 Ark. 162, 961 S.W.2d 724 (1998).
222. 78 Ark. App. 52, 77 S.W.3d 551 (2002).
223. *Jordan*, 2005 WL 984513, at *8 (Imber, J., dissenting).
224. *Id.* (Imber, J., dissenting).
225. *Id.* (Imber, J., dissenting).
226. *Id.* (Imber, J., dissenting).
227. *Id.* (Imber, J., dissenting).
228. *Id.* at *8–9 (Imber, J., dissenting).
229. *Jordan*, 2005 WL 984513, at *9 (Imber, J., dissenting).
230. *Id.* (Imber, J., dissenting).
231. *Id.* (Imber, J., dissenting).

likewise had not been satisfied.[232] Justice Imber fundamentally disagreed with the majority's conclusion that Jordan's signature on the rental contract, without more, was adequate to prove that he possessed the knowledge and understanding necessary to validly release Diamond from liability.[233] The dissent argued that, before the court could hold that Jordan possessed the requisite knowledge to release liability, evidence demonstrating that he had had an opportunity to thoroughly read and comprehend the exculpatory clause was necessary.[234]

In summary, the dissent argued that the majority opinion provided no clarity or explanation as to the scope or enforceability of the exculpatory clause, indorsed broad and general terms instead of specifically analyzing the language of the clause, and erroneously interpreted the limited evidence to hold that the rules of law pertaining to exculpatory clauses had been met.[235] The dissent was gravely concerned that henceforth, exculpatory clauses will not be disfavored or strictly construed against the parties relying on them, but rather, such clauses will be used as a vehicle to remove all potential liability and decrease business's motivation to exercise reasonable care.[236]

V. SIGNIFICANCE

The principal question raised by the *Jordan* decision is whether the Arkansas Supreme Court has abandoned the public policy limitations on exculpatory clauses that Arkansas courts have traditionally recognized.[237] If a party may limit virtually all liability and responsibility for injury arising out of its negligent conduct in an ordinary contract (lease transaction), the laws of torts only apply reliably to parties who are contractual strangers to one other.[238] If the validity and enforcement of exculpatory clauses now turns only upon the principles of contract construction, both "the protection of the law of torts, and the public policy imbued therein, [are] wholly subjugated to the pen of the scrivener."[239] At a minimum, if Arkansas courts interpret *Jordan* according to the majority's apparent intent, exculpatory clauses will no longer be disfavored.[240]

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232. *Id.* at *10 (Imber, J., dissenting).
233. *Id.* (Imber, J., dissenting).
234. *Id.* at *10 (Imber, J., dissenting).
235. *Jordan*, 2005 WL 984513, at *10 (Imber, J., dissenting).
236. *See id.* (Imber, J., dissenting).
237. Appellant's Petition for Rehearing at 4, Jordan v. Diamond Equipment & Supply Co., 2005 WL 984513 (Ark. Apr. 28, 2005)(No. 04-1113).
238. Appellant's Petition for Rehearing at *4, *Jordan* (No. 04-1113).
239. *Id.* at *5.
240. *Jordan*, 2005 WL 984513, at *10 (Imber, J., dissenting).

A. The Significance of *Jordan* to Claims of Negligence

The significance of the *Jordan* decision begins with a review of the evidence as presented and argued by the plaintiff. In *Jordan*, no evidence was presented to the court to show either that: (1) Jordan had previously operated a Bobcat; (2) he had been instructed on the use of the Bobcat on an inclined surface; or (3) he was aware of the magnitude of the weight distribution shift of the Bobcat when material was dumped from the bucket.[241] Furthermore, Jordan did not come to Diamond to rent the Bobcat loader specifically; to the contrary, he came to Diamond to receive advice about the appropriate piece of equipment to rent.[242] He subsequently received and relied upon this advice.[243] Jordan's rental was for a single job that was to be completed within one day.[244] Diamond is in the business of renting tools and equipment to the public and obviously possesses knowledge that is superior to the knowledge of the public, including members of the public who rent tools or equipment in the pursuit of their own businesses.[245] Jordan's rental of the Bobcat to facilitate the completion of a landscaping job related to his business, but this does not suggest that Jordan was a sophisticated businessperson or a competent and experienced Bobcat operator.[246] The transaction between Jordan and Diamond is similar to rental transactions into which most members of the public enter at one time or another. No material difference exists between Jordan's rental of the Bobcat and a routine consumer rental of a car, boat, trailer, recreational vehicle, carpet-cleaning machine, pressure washer, or sporting equipment. In each of these instances, a person with inferior knowledge will be renting from a person with superior knowledge.

Moreover, Diamond did not present any evidence tending to prove: (1) that any discussion took place between the parties specifically relating to the terms and meaning of the exculpatory clause, (2) that the exculpatory clause was "prominent" within the contract, or (3) that Jordan possessed any "actual knowledge" of the provisions of the exculpatory clause.[247] The majority simply relied on the fact that Jordan signed the contract and initialed the provision indicating that he had received safety instructions and had accepted the damage waiver, the language for which, is all located on the front of the rental agreement and unrelated to the exculpatory provisions located

241. *See* Joint Appendix at 6, *Jordan* (No. 04-1113).
242. *Jordan*, 2005 WL 984513, at *1.
243. *Id.*
244. *Id.*
245. *See id.*
246. *Jordan*, 2005 WL 984513, at *10 (Imber, J., dissenting).
247. *See id.* at *9.

on the reverse side in a section entitled "Warranties and Liability."[248] Although it is appropriate to hold parties accountable for the contents and meaning of the documents they sign;[249] traditionally, the laws pertaining to exculpatory clauses have required that parties possess actual, rather than imputed, knowledge of the liability they are releasing.[250] The majority apparently regarded Jordan's signing of the contract as establishing that he had the necessary knowledge and comprehension of the provisions of the exculpatory clause.[251]

According to the dissent, Jordan's testimony during his deposition contained enough uncertainty regarding his knowledge of the liability that he was releasing to raise the genuine question of fact necessary for the court to deny Diamond's motion for summary judgment and send the case to a jury to determine the facts consistent with the *Finagin* "factors" and the "totality of the transaction" approach.[252] The actual exculpatory language in the "Warranties and Liability" section is not particularly prominent; Jordan would have most likely had to read the entire reverse side of the rental agreement to be aware of (much less comprehend) the liability that he was releasing.[253]

Furthermore, the majority cited Jordan's approval of the damage waiver as proof of his acceptance of the exculpatory clause.[254] Jordan checked the box on the front of the rental contract accepting the damage waiver and agreeing to pay $11.20 in additional fees for the coverage provided by the damage waiver.[255] Jordan's purchase of the damage waiver

248. *Id.* (Imber, J., dissenting).

249. Carmichael v. Nationwide Life Ins. Co., 305 Ark. 549, 552, 810 S.W.2d 39, 41 (1991).

250. *See Jordan*, 2005 WL 984513, at *10 (Imber, J., dissenting).

251. *Id.* (Imber, J., dissenting).

252. *Id.* (Imber, J., dissenting).

253. *See generally* Joint Appendix at 92–93, *Jordan* (No. 04-1113).

254. *Jordan*, 2005 WL 984513, at *4.

255. *See generally* Joint Appendix at 92, *Jordan* (No. 04-1113). Although Jordan most likely perceived that by accepting the damage waiver and paying the additional rental amount he was buying "insurance" coverage against accidental damage to the Bobcat, the reverse side of the agreement contained four exceptions to the "limited damage waiver" that virtually exempted most accidents that could have occurred during a one day rental, thereby negating the effectiveness and perceived benefit of the damage waiver. The Limited Damage Waiver reads as follows:

> If customer has agreed to purchase limited damage waiver, and takes all reasonable precautions to safeguard rented items and uses them in a safe and responsible manner, Diamond Equipment assumes the risk of direct physical loss or damage due to accidental damage to rental equipment except in the following circumstances:
>
> 1. Loss, damage or failure of tires and tubes under any circumstances.
>
> 2. If equipment is overloaded, operated above the rated capacity, rolled over, or if operating and safety instructions are not followed.

does not support a presumption of a knowing acceptance of the exculpatory clause and a release of Diamond from all liability for negligence.[256] Rather, Jordan's purchase of the damage waiver would support the contrary finding—that he sought protection from risk of loss and damage, not that he knowingly released Diamond from all loss that was caused by its own negligence.

B. The Significance of *Jordan* to Claims of Strict Products Liability

Jordan did not allege an actual product defect with the Bobcat; rather, he alleged various counts of "failure to warn" based only on the negligence of Diamond.[257] Because Jordan pled his "failure to warn" claims against Diamond under negligence principles, the Arkansas Supreme Court did not consider the enforceability of the exculpatory clause under principles of strict liability.[258]

In Arkansas, when a duty to warn exists, a "failure to warn" is also actionable as a species of strict liability.[259] Specifically, Arkansas law provides that, in order to state a cause of action under strict liability, a plaintiff must plead:

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3. If customer fails to contact Diamond Equipment regarding maintenance and servicing of equipment, including but without limitation, lubrication, change of filters when required, and maintenance of adequate air, oil, water, or fuel pressures or levels.

4. If damage results from improper or unsafe operation or care whether caused by negligence, lack of training, incompetence, or infidelity of the customer's employee or other person to whom rented items are entrusted. Damage waiver does not cover theft of equipment while in renter's possession.

Id. at 92.

256. *See Jordan*, 2005 WL 984513 at *10 (Imber, J., dissenting).

257. *Id.* at *1. Initially, Jordan included Clark Equipment, the manufacturer of the Bobcat, as a separate defendant in his action; however, Jordan settled with Clark Equipment and subsequently dismissed it from the action on May 14, 2005 (approximately two weeks after the action was filed). *Id.* at *1–2.

258. *Jordan*, 2005 WL 984513, at *1.

259. West v. Searle & Co., *et al.* 305 Ark. 33, 37, 806 S.W.2d 608, 610 (1991) ("As a general rule, a manufacturer [and his agents] has a duty to warn the ultimate user of the risks of its product. This duty exists under either the negligence or strict liability theories."); *see also* ARK. CODE ANN. §§ 16-116-101 to -107 (Michie 1987) ("Arkansas Product Liability Act of 1979"). For more discussion on Arkansas cases that have applied "failure to warn" as a strict liability *see* DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983) (applying Arkansas law); French v. Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981) (applying Arkansas law); Parker v. Seaboard Coastline R.R., 573 F.2d 1004 (8th Cir. 1978) (applying Arkansas law); Gisriel v. Uniroyal, Inc., 517 F.2d 699 (8th Cir. 1975) (applying Arkansas law); Boerner v. Brown & Williamson Tobacco Co., 126 F. Supp. 2d 1160 (E.D. Ark. 1999); Lee v. Martin, 74 Ark. App. 193, 45 S.W.3d 860 (2001); Hergeth, Inc. v. Green, 293 Ark. 119, 733 S.W.2d 409 (1987); Forrest City Machine Works, Inc. v. Aderhold, 273 Ark. 33, 616 S.W.2d 720 (1981).

> (1) that he has sustained damages; (2) that the defendant was engaged in the business of manufacturing, or assembling, or selling, or leasing, or distributing the product; (3) that the product was supplied by the defendant in a defective condition which rendered it unreasonably dangerous; and (4) that the defective condition was a proximate cause of plaintiff's damages.[260]

Thus, Arkansas and many other jurisdictions have held that "the same policy objectives that are served by holding commercial product sellers strictly liable also apply to commercial product lessors."[261]

With the increased use of leasing as a short-term convenience and alternative to purchasing, it is not clear in states that have extended strict liability to lessors:

> to what extent, if any, the operation of the strict tort liability doctrine can be avoided by the lease agreement [exculpatory clause] . . . there is authority to the effect that case law defining liability of a [lessor] to a third person loses its force to the extent that such law is inconsistent with the

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260. *West*, 305 Ark. at 37, 806 S.W.2d at 610 (citing ARK. CODE ANN. §§ 16-116-101 to -107 (Michie 1987)). In Arkansas, a product defect is defined as either a manufacturing defect, a design defect, or an inadequate warning. *Id.*

261. *See* ARK. CODE ANN. §§ 16-116-101 to -107 (Michie 1987); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY: DEFINITION OF ONE WHO SELLS OR OTHERWISE DISTRIBUTES § 20(b) (1998). During the formative years of products liability law, courts focused primarily on extending strict liability to sales transactions. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20(b). After the promulgation of § 402 of the Restatement (Second) of Torts (the predecessor to section 20(b) of the Restatement (Third) of Torts: Products Liability), the courts began to expand strict liability for harm caused by products that were involved in non-traditional sales transactions such as rentals, leases, or promotional give-aways. *Id.* According to the Restatement (Third) of Torts: Products Liability section 20(b):

> [o]ne otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial non-sale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

Id. Particularly in lease transactions, an argument can be made that an even greater reason for extending strict product liability to lessors may be that: (1) lessees are less apt to possess the necessary knowledge and skill to conduct a thorough inspection of the rental equipment; and (2) lessees may be prone to forgo the inspection of the rental equipment because they (perhaps naively) believe that commercial lessors (being knowledgeable of the maintenance requirements and operating parameters of the equipment in their rental inventory) have ensured that the equipment has been maintained properly and is currently operating correctly. Allan E. Korpela, Annotation, *Products Liability: Application of Strict Liability in Tort Doctrine to Lessor of Personal Property*, 52 A.L.R.3d 121 § 2(a) (2004).

> doctrine imposing strict liability for injury caused by a defect [failure to warn] in a leased product.[262]

Noting that Arkansas, and several states bordering Arkansas (Louisiana, Missouri, Oklahoma, Tennessee, and Texas),[263] are among those having held previously that strict product liability may be extended to lessors,[264] Arkansas practitioners should carefully consider the potential validity and enforceability of exculpatory clauses when asserted as a defense against a claim of strict products liability. The policy considerations inherent in strict

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262. Allan E. Korpela, Annotation, *Products Liability: Application of Strict Liability in Tort Doctrine to Lessor of Personal Property*, 52 A.L.R.3d 121 § 2(b) (2004).

263. The strict products liability laws (particularly pertaining to lessors) of these states may be of specific interest to Arkansas practitioners who have clients with operations located in these bordering states for which they wish to limit potential liability through the use of an exculpatory clause.

264. Korpela, *supra* note 261, at § 3; "In the following products liability cases it has been held that the strict tort liability doctrine is applicable not only to sellers and manufacturers of defective products but also to persons engaged in the business of leasing chattels." The following cases are cited: Alaska—Bachner v. Pearson, 479 P.2d 319 (1970); California—Price v. Shell Oil Co., 466 P.2d 722 (Cal. 1970); Martinez v. Nichols Conveyor & Engineering Co., 52 Cal. Rptr. 842 (Cal. Ct. App. 1966); McClaflin v. Bayshore Equipment Rental Co., 79 Cal. Rptr. 387 (Cal. Ct. App. 1969); Fakhoury v. Magner, 101 Cal. Rptr. 473 (Cal. Ct. App.1972); Colordo—Baird v. Power Rental Equipment, Inc., 533 P.2d 941 (Colo. Ct. App. 1975); Delaware—Martin v. Ryder Truck Rental, Inc., 353 A.2d 581 (Del. 1976); Florida—Futch v. Ryder Truck Rental, Inc., 391 So.2d 808 (Fla. Dist. Ct. App. 1980); Hawaii—Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240 (Haw. Ct. App. 1970); Illinois—Galluccio v. Hertz Corp., 274 N.E.2d 178 (Ill. App. Ct.1971), *overruled by* Saieva v. Budget Rent-A-Car, 591 N.E.2d 507 (Ill. App. Ct. 1992); Profilet v. Falconite, 371 N.E.2d 1069 (Ill. App. Ct. 1977); Indiana—Gilbert v. Stone City Constr. Co., 357 N.E.2d 738 (Ind. App. 1976)(superseded by statute); Louisiana—Cardwell v. Jefferson Rentals, 379 So. 2d 255 (La. Ct. App. 1979); Missouri—Wright v. Newman, 735 F.2d 1073 (8th. Cir. 1984) (applying Missouri law); Nebraska—Hawkins Constr. Co. v. Matthews Co., 209 N.W.2d 643 (Neb. 1973), *overruled by* Nat'l Crane Corp. v. Matthews, Co., 332 N.W.2d 39 (Neb. 1983); New Jersey—Cintrone v. Hertz Truck Leasing & Rental Serv., 212 A.2d 769 (N.J. 1965); Ettin v. Ava Truck Leasing, Inc., 251 A.2d 278 (N.J. 1969); A-Leet Leasing Corp. v. Kingshead Corp., 375 A.2d 1208 (N.J. Super. Ct. App. Div. 1977); New Mexico—Stang v. Hertz Corp., 497 P.2d 732 (N.M. 1972); Rudisaile v. Hawk Aviation, Inc., 592 P.2d 175 (N.M.1979); New York—Waters v. Patent Scaffold Co., 427 N.Y.S.2d 436 (N.Y. App. Div.1980); Samaras v. Gatx Leasing Corp., 428 N.Y.S.2d 48 (N.Y. App. Div. 1980); Oklahoma—Dewberry v. La Follette, 598 P.2d 241(Okla. 1979); Coleman v. Hertz Corp., 534 P.2d 940 (Okla. Civ. App. 1975); Oregon—Fulbright v. Klamath Gas Co., 533 P.2d 316 (Or. 1975); Pennsylvania—Francioni v. Gibsonia Truck Corp., 372 A.2d 736 (Pa. 1977); Nath v. Nat'l Equip. Leasing Corp. 373 A.2d 1105 (Pa. 1977); Mandel v. Gulf Leasing Corp., 378 A.2d 487 (Pa. Super. Ct. 1977); Texas—Exxon Corp. v. Butler Drilling Co., 508 S.W.2d 901 (Tex. Civ. App. 1974); Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ. App. 1974); Wisconsin—George v. Tonjes, 414 F. Supp. 1199 (W.D. Wis. 1976) (applying Wisconsin law) (Lessor is subject to strict liability because its position in overall production and marketing enterprise is no different from that of seller, and because lessor is as capable as seller of preventing defective product from proceeding through stream of commerce). *Id.*

products liability (as opposed to negligence) may dictate an entirely different outcome when an exculpatory clause is raised as a defense to a strict products liability claim.

VI. CONCLUSION

If, by the mere act of signing an agreement, knowledge may be imputed to the signer without thorough consideration of specific evidence (in light of the totality of the transaction) indicating that the signer possessed actual knowledge and understanding of the contents of that agreement, exculpatory clauses are no longer less favored than other contract terms.[265] The effect could be profound in that providers of services in Arkansas will perceive *Jordan* to be a blanket approval of exculpatory clauses in routine transactions.[266] By applying the rules of law (related to the validity and enforcement of exculpatory clauses) resulting from the *Jordan* decision to other service providers, it is easy to conceive contractual transactions in which accountants, doctors, bankers, architects, or contractors exempt themselves from all potential tort liability, including liability for negligence, stemming from the performance of their services.[267] If *Jordan* is applied to enforce exculpatory clauses against unsophisticated persons who may not have actually comprehended and voluntarily dismissed the risk involved, traditional tort law will become a historical footnote. Accordingly, Arkansas courts must apply careful scrutiny when evaluating the facts of such cases in order to ascertain the actual knowledge of the parties, or a simple signature will be all that is required to eliminate the protections of traditional tort law, and the public policy provisions imbedded therein, from all service related transactions.

*John G. Shram**

265. *See Jordan*, 2005 WL 984513 at *8 (Imber, J., dissenting).

266. Appellant's Petition for Rehearing at *5, *Jordan* (04-1113).

267. *See id.* at *4–5.

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